

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.3 “Contact” Offenses

B. Criminal Sexual Conduct—Fourth Degree

Insert the following new sub-subsection before Section 2.4 on page 43:

6. Pertinent Case Law

In *People v Russell*, ___ Mich App ___, ___ (2005), the Court of Appeals upheld the constitutionality of the CSC IV statute. In *Russell*, the defendant argued that MCL 750.520e(1)(d) is “unconstitutionally vague because it ‘appears to absolutely preclude any sexual contact between . . . two consenting adults related by marriage only.’” The Court of Appeals rejected the defendant’s argument, finding that the term “affinity” is not unconstitutionally vague, and that the statute does not give “the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed” because “sexual contact” is clearly defined.

CHAPTER 3

Other Related Offenses

3.16 Indecent Exposure

D. Pertinent Case Law

Insert the following new sub-subsection after the June 2003 update to page 162:

6. Indecent Act Televised

In *People v Huffman*, ___ Mich App ___, ___ (2005), the defendant produced a television show with a three-minute segment showing a penis and testicles marked with facial features. A voice-over provided “purportedly humorous commentary as if on behalf of the character.” *Id.* The defendant was charged with and convicted of indecent exposure. On appeal, the defendant argued that MCL 750.335a cannot be properly construed to apply to televised images. The Court of Appeals upheld the conviction, concluding that the purposes of the indecent exposure statute are “fulfilled by focusing on the impact that offensive conduct might have on persons subject to an exposure.” *Huffman, supra*. The Court found that a televised exposure could be more shocking than a physical exposure because the persons subjected to it are in private homes. Furthermore, the defendant’s exposure on television was more likely a close up and lasted longer than a physical exposure. *Id.*

The court also concluded that defendant’s right to free speech was not violated by his conviction of indecent exposure. *Id.*, relying on *United States v O’Brien*, 391 US 367 (1968), *Barnes v Glen Theatre, Inc.*, 501 US 560 (1991), and *City of Erie v Pap’s AM*, 529 US 277 (2000).

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the May 2005 update to page 364:

A witness' statement identifying the defendants for police is a testimonial statement under *Crawford v Washington*, 541 US 36 (2004). In *United States v Pugh*, ___ F3d ___, ___ (CA 6, 2005), the defendants were convicted of several counts relating to a bank robbery. During the trial, a police officer testified that a witness identified pictures of the defendants during the witness' interview with police. The witness never testified at trial, and it is unclear whether she was unavailable or simply absent. The United States Court of Appeals for the Sixth Circuit concluded that the statement was given during a formal police interrogation, and a reasonable person would anticipate that the statement would be used against the accused for investigation and prosecution. Therefore, the statement was testimonial in nature. Further, the statement was offered for the truth of the matter asserted – that the defendants were in fact the men in the picture.

CHAPTER 7

General Evidence

7.6 Former Testimony of Unavailable Witness

Insert the following text after the October 2004 update to page 364:

*See the October 2004 update to page 364 for a detailed discussion of this case.

The prosecutor appealed the Court of Appeals decision in *People v Shepherd*, 263 Mich App 665 (2004),* and the Michigan Supreme Court reversed the Court of Appeals and reinstated the defendant's perjury conviction. *People v Shepherd*, ___ Mich ___, ___ (2005). The Court found the alleged constitutional error was harmless beyond a reasonable doubt because there was "overwhelming evidence of the falsity of defendant's testimony in the fleeing and eluding trial, . . . [and] it is clear beyond a reasonable doubt that a reasonable jury would have found defendant guilty of perjury even if the transcript of Butters's plea to the charge of subornation of perjury had not been admitted." Because the Court determined that the error was harmless, the Court found that it was "not necessary to address whether the admission of the transcript violated the Confrontation Clause of the United States Constitution, US Const, Am VI" *Shepherd, supra* at ___ n 4.

CHAPTER 10

Other Remedies for Victims of Sexual Assault

10.3 Defenses to Civil Actions

A. Statutes of Limitations for Civil Actions

2. Commencement of Limitations Period and the “Discovery Rule”

Insert the following text immediately before sub-subsection (3) on page 486:

The discovery rule is applied “to avoid unjust results which could occur when a reasonable and diligent plaintiff would be denied the opportunity to bring a claim due [] to . . . the inability of the plaintiff to learn of or identify the causal connection between the injury and the breach of a duty owed by a defendant.” *Trentadue v Buckler Automatic Lawn Sprinkler Co*, ____ Mich App ____ (2005).

In *Trentadue*, the plaintiff brought claims against the defendants that, without application of the discovery rule, would have been precluded by the relevant statutes of limitation. The defendants argued that the discovery rule could not be used to extend a claim’s date of accrual until the perpetrator’s identity is established or a plaintiff has determined all the causes of action possible. The Court of Appeals agreed with the plaintiff that the discovery rule applied to mark the date of accrual as the date on which the reasonable and diligent plaintiff discovered the causal relationship between the plaintiff’s injury (the victim’s death) and the defendants’ breach of a duty owed to the victim. *Id.* at ____.

The Court distinguished the case from cases of unknown identity to which the discovery rule does not apply. In *Trentadue*, the plaintiff was aware of the injury and the cause (the plaintiff’s decedent was murdered); what the plaintiff did not know, and could not have known until the killer’s culpability was established, was that other parties, based on their relationship to the killer, harmed the victim by breaching duties owed to the victim. *Id.* at ____.